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In the

Supreme Court of the United States

October Term, 1967

No. 776

THE NATIONAL COMMITTEE OF GIBRAN,
also known as THE COMITE NATIONAL DE GIBRAN,
representing THE TOWN OF BECHARRE, LEBANON,
Petitioner,

v.

GEORGE G. SHIYA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

GEORGE G. SHIYA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on July 10, 1967.

CITATION TO OPINIONS BELOW

The United States District Court for the Southern District of New York did not render an opinion, but its findings of fact and conclusions of law are set forth in the Record at pages 1105-1109, reproduced in Petitioner's Ap-

pendix in the Court of Appeals at pages 13a-17a, and reprinted in the Appendix hereto at pages App. 17-20, *infra*. The opinion of the Court of Appeals, which is reprinted in the Appendix at pages App. 1-16, *infra*, is not yet officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 1967. See Appendix, *infra*, App. 16. A timely petition for rehearing was denied on September 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where a federal court, in the exercise of its non-diversity jurisdiction ancillary to its exclusive jurisdiction to try copyright actions, hears a fee contract dispute between an attorney and his former client relating to services performed by the attorney in the copyright litigation, should the court apply state or federal law in resolving the dispute?

2. If the federal court should apply state law, were the lower courts' determinations in this case in conflict with governing state rules?

3. If the federal court should apply federal law, (a) where the court concludes that both the contingent fee contract and the surrounding circumstances are ambiguous, should the court resolve the ambiguities against the attorney who drafted the contract, and (b) should the court inquire into the reasonableness of the amount of the fee where it appears that the fee may be grossly excessive in relation to the services performed by the attorney?

STATEMENT

This case raises important questions respecting the applicability, in a federal non-diversity action, of state law governing contingent fee contracts, and also respecting the substance of the rules applied in this case. In very general terms, the relevant facts are these: Petitioner, a Lebanese public board of trustees, entered into a contingent fee contract with respondent, a New York attorney, under which respondent defended petitioner's ownership of valuable copyrights. Petitioner's position in the federal court copyright litigation was upheld. Five years later, a dispute arose between petitioner and respondent as to the meaning of the contingent fee contract. Under petitioner's interpretation of the contract, respondent's fee would have been $45,087.86 —almost exactly the amount respondent had withdrawn from funds in his hands. Under respondent's interpretation, he would receive a fee almost surely in excess of $1,000,000. Respondent asserted his claim for additional fees in a petition for ancillary relief in the original, and long since terminated, copyright action. In defending, petitioner relied upon New York law, under which contingent fee contracts are construed very strictly against attorneys and under which the courts may reduce an unreasonable fee even where it is plainly called for under the contract. The federal district judge, however, expressly declined to apply state law, and accepted respondent's construction of the contract. The Court of Appeals, in a 2-1 decision, affirmed. Although the Court found both the fee contract and the surrounding circumstances ambiguous, it refused to construe those ambiguities against respondent, the attorney who had drafted the contract. Moreover, the Court refused to consider whether the huge fee awarded to respondent was reasonable in terms of the services respondent had rendered. Thus the Court of Appeals departed, as had the District Court, from the rules prevailing in New York state courts—rules that, as we show later, also prevail in other state and federal jurisdictions.

In more detail, the facts are as follows:

1. *The Gibran bequest and the establishment of petitioner Committee.* Kahlil Gibran, a Lebanese who acquired United States citizenship, died in the State of New York in 1931. He left a will bequeathing to his native town of Becharre the copyrights to seven of his works, the royalties from which were to be used for public purposes. In 1935, the Lebanese Government authorized the establishment of petitioner Committee to administer the Gibran bequest.[1] (CA Op., App. *infra* p. 3.)[2]

This 1931 bequest has turned out to be of enormous benefit to the town of Becharre, for today Gibran is one of the most popular of modern philosopher-poets, and by all signs his popularity is waxing, not waning. Thus, while his works over the years claimed an ever increasing public recognition, in the past seven years the sales of those works, particularly "The Prophet," have accelerated at a truly remarkable pace.[3]

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[1] Petitioner represents that on September 19, 1967, by decree of the Government of Lebanon No. 8218, his Excellency Badri Meouchy, Minister of Interior, was named provisional chairman of the Committee, and other public officials, including the Governor of Northern Lebanon and the President of the Municipality of Becharre, were named provisional members.

[2] Citations to the Court of Appeals opinion, which is reproduced in the Appendix hereto, appear herein as "CA Op." Citations to the record appear as "R." and to the Appendices, which are part of the Record, as follows: All references including a "b," such as "App. p. 155b," are to the Appendix filed by respondent in the Court of Appeals, and all references including an "a" are to the Appendix filed by petitioner.

[3] A full account of the amounts of royalties from 1946 to 1966 is set forth in the Record at App. 76a, a table that is reproduced herein in the Appendix at p. 21, *infra.* As that table discloses, from 1946 to March 31, 1960, total royalties amounted to $215,247.04, whereas from the latter date through March 31, 1966, the royalties amounted to $616,542.19.

While the litigation we describe below has impeded the flow of royalties to the Committee, the substantial sums that have been received despite the litigation have enabled the Committee to provide for the operation of a medical clinic for the poor, for the awarding of scholarships to needy students, for financial assistance to impoverished families, for aid to churches, for the operation of a museum in which the art of Kahlil Gibran is displayed, and for other charitable and cultural programs of great significance to the town of Becharre and all Lebanon (R. 1535).

2. *The copyright litigation.* Respondent was retained by petitioner because of a dispute that arose over the renewal rights to the Gibran copyrights. The first of the original copyrights expired in 1946, and the last in 1959. As they expired, renewal applications were filed both by the administrators of the Gibran estate and by the author's sister, Mary K. Gibran. The sister claimed the renewal royalties from the publisher, Alfred A. Knopf, Inc. Accordingly, the publisher held the royalties in escrow pending resolution of the dispute. To settle the controversy, Mary K. Gibran and the administrators, on January 15, 1953, commenced suit against the publisher in the Federal District Court for the Southern District of New York. The publisher thereupon interpleaded petitioner Committee, the real party in interest. (CA Op., App. *infra* p. 3; App. pp. 13a-14a.)

In that litigation, petitioner was represented by respondent. He was successful. Both the District Court and the Court of Appeals held that, under the Copyright Act, 17 U.S.C. 24, the administrators, and not Gibran's sister, were entitled to the renewal rights, and also that under the Gibran will the adminsitrators were obliged to assign those copyrights to petitioner. *Gibran v. Alfred A. Knopf*, 153 F.

Supp. 854 (S.D.N.Y. 1957), *aff'd*, 255 F.2d 121 (1958), *cert. den.*, 358 U.S. 828.[4]

3. *The contingent fee contract.* The basis for respondent's compensation in the copyright litigation was a contingent fee contract. The contest in the lower courts was whether, under that contract, respondent was entitled to 25% of the royalties that had accumulated *up to the termination of the copyright litigation*, or whether he was entitled to a 25% interest in all of the royalties *from the commencement of the copyright litigation until the ultimate expiration of the last of the copyrights in 1987.* On the first theory, his compensation would have been $45,087.86—an amount that, under cir-

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[4]While we do not wish to imply that respondent did not competently represent petitioner in this litigation, had the lower courts accepted petitioner's contention that they should inquire into the reasonableness of the fee—an issue we discuss later—it would have been relevant to examine the substantiality of Mary K. Gibran's claim to the renewal copyrights. Such an examination would, we suggest, have demonstrated that the claim verged on the frivolous. Thus, her first contention was that, under the statutory provision according priority of application for renewal copyrights first to "executors" and then to next of kin "in the absence of a will," the fact that Gibran did not name an executor in his will foreclosed the administrators c.t.a, from asserting priority over the next of kin. To ascribe to the Congress an intent to treat "executors" differently than "administrators" where the author did leave a will would, as Judge Weinfeld put it, require "slavish literal interpretation" of the Act. 153 F. Supp., at 858. Second, Mary K. Gibran contended that in any event the statute did not authorize Gibran to bequeath the renewal copyrights to petitioner because it provided only that "Copyrights secured under this title . . . may be bequeathed by will," and did not specifically mention "renewal" copyrights. Judge Weinfeld characterized this contention as being "as narrow as it is legalistic." *Id.*, at 860. Finally, Mary K. Gibran maintained that her brother had not bequeathed the renewal copyrights to Becharre and that they should pass to her by intestate succession, despite the fact that the will stated: "The royalties on my copyrights, which copyrights I understand can be extended upon request by my heirs for an additional twenty-eight years after my death, are to go to my hometown." *Id.*, at 856.

cumstances we describe later, was paid to him almost in its entirety in 1960 upon termination of the litigation. On the second theory, which was adopted by the lower courts, his compensation is virtually certain to exceed $1,000,000, and may well amount to much more.[5]

The contingent fee contract was consummated in 1956. This contract superseded a prior contract that was discussed by the Court of Appeals. Accordingly we first describe this earlier agreement and then the 1956 contract.

a. *The 1953 contract.* On December 3, 1953, the Committee's attorney-in-fact in the United States, one Dr. Basile, who had been asked for assistance by petitioner when the copyright dispute arose, signed an agreement with respondent. Under the agreement, which was drafted by respondent, respondent was retained to press the National Committee's "claim for the funds deposited in Court by Alfred A. Knopf, Incorporated, in connection with the litigation now pending" respecting Mary K. Gibran's claim to the royalties. The agreement provided that Basile would "not settle this claim in any manner without your [respondent's] consent

[5] The total renewal royalties as of March 31, 1966, were $831,789.23. See App. *infra* p. 21. From that date to March 31, 1967, while the record in this case had already been closed, petitioner represents that royalties amounted to $171,437.85. The total of renewal royalties, thus, is $1,003,227.08, of which 25% would be slightly over $250,000. Moreover, as we have already indicated, *supra* note 3, the increase in royalties in recent years has been remarkable. In 1953, when the copyright litigation began, the combined royalties for the seven preceding years were $21,518.58. In 1960 alone, the year the litigation terminated, the royalties were $42,703.74. See App. *infra* p. 21. During 1966, the royalties amounted to $170,373.20. Even assuming that royalties continue only at the 1966 rate, and excluding the as yet unexploited paperback rights, respondent would receive a minimum of approximately $750,000. As the record of royalties shows, moreover, this is a most unlikely assumption. Finally, there is a possibility that respondent may claim an interest in subsidiary rights, such as television, movie, and recording rights. The amount involved in such rights is, of course, not calculable now, but might well be very large indeed.

as attorney,"[6] and that respondent could "retain out of any moneys that may come into [his] hands, thirty-five (35%) percent of all sums recovered by settlement, suit or otherwise for or on behalf of The National Committee of Gibran. . . ."[7] (CA Op., App., *infra* pp. 3-5.)

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[6] A provision invalid as contrary to public policy. See, *e.g.*, cases collected in 100 A.L.R.2d 1386-7; 7 Am. Jur. 2d § 227.

[7] The full text of the agreement was as follows (App. p. 32a):

"George G. Shiya, Esq.
115 Broadway
New York 6, New York

Dear Mr. Shiya:

I, the undersigned, Naef K. Basile, M.D., in my capacity as attorney in fact for the National Committee of Gibran, by virtue of a power of attorney executed on June 3, 1953 by Joseph Gibrail Rahme, President of The National Committee of Gibran, do hereby retain you as my attorney to prosecute and adjust for me and for the said National Committee of Gibran, our claim for the funds deposited in Court by Alfred A. Knopf, Incorporated, in connection with the litigation now pending in the United States District Court, Southern District of New York entitled:

Mary K. Gibran and William Saxe, as administrators c.t.a. of the Estate of Kahlil Gibran, and Mary K. Gibran, Plaintiffs, against Alfred A. Knopf, Incorporated, Defendant, against The National Committee of Gibran, et al., Interpleaded Defendants.

and I do hereby give you as my said attorney the exclusive right to take all legal steps to enforce my said claim and I hereby further agree not to settle this claim in any manner without your consent as attorney.

In consideration of the services rendered and to be rendered by you as my attorney, I hereby agree to pay you, and you are authorized to retain out of any moneys that may come into your hands, thirty-five (35%) per cent of all sums recovered by settlement, suit or otherwise for or on behalf of The National Committee of Gibran in the above described action, proceeding or litigation.

Dated: New York, New York
December 3, 1953

(sgd) N. Basile M.D."

(continued)

At that time, in 1953, the amount of accumulated royalties—the "funds deposited in Court" by the publisher because of the dispute as to the ownership of the renewal copyrights—was $21,518.58 (App. *infra* p. 21). At the conclusion of the litigation, the "moneys that [came] into [respondent's] hands," the "sums recovered" on behalf of petitioner, amounted to $180,351.45 (App. *infra* p. 21; App. p. 27a).

b. *Renegotiation of the 1953 contract—the final 1956 contract.* When Basile advised petitioner prior to executing the 1953 contract that respondent demanded a 35% retainer if he paid expenses, petitioner's President responded that the percentage figure was too high and instructed respondent to search for another attorney who would charge less. Basile did so, but without success, and thereupon entered into the 1953 agreement without communicating further with petitioner. Indeed, neither respondent nor Basile advised petitioner of the terms of the retainer agreement until over a year after it was signed, when Basile responded to an inquiry by petitioner (CA Op., App. *infra* pp. 5-6; App. 166b-167b). Petitioner thereupon asked Basile to renegotiate the agreement because "Lebanese law restricted retainers to 20% and . . . the members of the Committee would be surcharged for any excess they paid" (CA Op., App. *infra* p. 5).[8]

While this letter was addressed to respondent, both Basile and respondent testified that respondent dictated it and had it typewritten and signed in his office (Reply Br. App. 7a-8a, R. 1334, 1436).

[8] At another point in its opinion, the Court of Appeals stated that the Committee "had second thoughts about the fairness of the basic agreement when the subject matter of the litigation proved far more valuable than had earlier appeared" (CA Op., App. *infra* p. 11). While the Court's statement of facts is generally accurate, this characterization of the Committee's motive in seeking renegotiation is wholly unsupported by the record. In fact, the dramatic upturn in royalties did not begin until 1960, fully five years after the date of the negotiations. See App. *infra* p. 21. The Court's first explanation of the facts giving rise to the renegotiation, quoted in the text above, is correct, not its second.

There followed an exchange of correspondence between Basile and the Committee respecting the terms upon which a new agreement might be made. The correspondence focused primarily upon whether the 35% figure in the 1953 agreement should be reduced, not upon the corpus to which that figure would relate—whether accrued royalties or future royalties as well. Thus, the relevant passages in the correspondence—which was all in Arabic—are not clear. The Court of Appeals observed: "All of these references are ambiguous; they can be read to refer either to the frozen royalties or to all the royalties" (CA Op., App. *infra* p. 12).

Following the Basile-Committee exchange of letters, respondent drafted an agreement dated September 8, 1956, which was forwarded to petitioner by Basile. Basile's covering letter, according to the Court of Appeals, contained language providing "some support for the argument that the parties intended to limit [respondent's] fee to a percentage of the funds frozen" (CA Op., App. *infra* p. 12). The Court of Appeals considered that this view of the parties' intent was also "supported by the language of the attached retainer drafted by [respondent]."

Under that retainer agreement, respondent was to receive "twenty-five per cent (25%) of all moneys determined by the Court to be due The National Committee of Gibran," and the Court "was authorized to provide that twenty-five per cent (25%) of all moneys on deposit in the Registry of said Court to the credit of the said action be paid directly to [respondent]. . . ." Moreover, the agreement explicitly provided that the amount of the fee was to be fixed as of whatever time the litigation terminated. Thus, in the event the litigation did not terminate at the district court level, a subsequent paragraph in the agreement provided that "[i]n view of the possibility of an appeal . . . you [respondent] shall be entitled to receive . . . twenty-five per cent (25%)

of all moneys due the National Committee of Gibran . . . at the time of the final determination of such appeal . . . ."[9]

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[9]The full agreement, which was drafted by respondent in the form of a letter to him from the President of the Committee (CA Op., App. *infra* p. 14), was as follows:

"George G. Shiya, Esq.
115 Broadway
New York 6, New York

Dear Mr. Shiya:

This is to confirm and to bring down to date our previous agreement with you that in consideration of legal services heretofore rendered and to be rendered by you in the action now pending in the United States District Court for the Southern District of New York, entitled:

CIVIL ACTION No. 82-18

Mary K. Gibran and William Saxe,
as Administrators c.t.a. of the
Estate of Kahlil Gibran, and
Mary K. Gibran,
Plaintiffs,
against
Alfred A. Knopf, Incorporated,
Defendant,
against
The National Committee of Gibran,
also known as the Comite National
de Gibran, et al.,
Interpleaded Defendants.

you are entitled to receive as compensation for such services twenty-five per cent (25%) of all moneys determined by the Court to be due to The National Committee of Gibran, also known as the Comite National de Gibran, and the said Court or any judge thereof is hereby authorized to provide in any appropriate judgment, decree or order in the said action that twenty-five per cent (25%) of all moneys on deposit in the Registry of said Court to the credit of the said action be paid directly to you, George G. Shiya, and that the remaining seventy-five per cent (75%) thereof be paid to The National Committee of Gibran, also known as Comite National de Gibran.

(continued)

Petitioner did not sign the proposed agreement immediately. Rather, in a letter to Basile dated October 11, 1956, petitioner asserted that the provisions of the agreement "fully contradict the agreement which has been reached...." While noting that "[i]t was agreed between them that the committee pay him 25% of the frozen money in New York upon termination of the case there, or in any other city, till the final stages," petitioner objected that "[t]he committee does not pay [respondent's] fees or expenses if the case is not won." (CA Op., App. *infra* pp. 8-9.) Petitioner had agreed to the 25% figure rather than the 20% figure that is permissible in Lebanon because petitioner considered the additional 5% offset by respondent's agreement to bear the expenses of litigation (CA Op., App. *infra* p. 6); but the proposed agreement contained no provision respecting expenses.

In response to the request for clarification, respondent on November 1, 1956, wrote the Committee a letter "to confirm the agreement" between the parties and "supplement-

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In view of the possibility of an appeal by one or the other of the parties to said action from the determination of the said District Court, it is our further understanding and it is agreed that you shall be entitled to receive as compensation for your services twenty-five per cent (25%) of all moneys due The National Committee of Gibran, also known as the Comite National de Gibran, at the time of the final determination of such appeal or appeals whether said moneys are on deposit in the Registry of the said Court or in the hands of Alfred A. Knopf, Incorporated, and the said Knopf is hereby authorized and directed to make such payment to you and to remit the remaining seventy-five per cent (75%) thereof to The National Committee of Gibran, also known as the Comite National de Gibran.

Joseph Gibrail Rahme,
President

The National Committee of Gibran,
also known as the Comite National de
Gibran"

ing the written retainer forwarded to you in September...." That letter, which was signed by the Committee and returned to respondent, met the objections raised by the Committee.[10] Thus, the November letter made it clear that respondent was to be entitled to a fee "only in the event that the final judgment in this case is rendered in favor of Comite National De Gibran," and also that in the event of an unfavorable outcome of the copyright litigation respondent would "make no claim for . . . expenses and disbursements." This, then, was the final contract—the contingent fee arrangement reflected in the September, 1956 agreement, as supplemented by the November 1956 letter—both drafted by respondent.

4. *Respondent's actions after termination of the copyright litigation.* At the conclusion of the copyright litiga-

[10]The text of the letter was as follows:

"November 1, 1956

"Comite National De Gibran
Becperry, Lebanon

Dear Sirs:

This letter will serve to confirm the agreement between us supplementing the written retainer forwarded to you in September for your signature before the American Consul in Beirut.

It is understood and agreed between us that the payment to me of the sum of 25% of the monies due and owing from Knopf to the Comite National De Gibran, will be made after the termination of the litigation in the U.S. District Court and any other court to which the case may be taken on appeal. Such payment is to be made to me only in the event that the final judgment in this case is rendered in favor of Comite National De Gibran.

It is also understood and agreed that the above compensation of 25% of monies due and owing from Knopf to Comite National De Gibran will include payment for services rendered by me in this matter, in addition to all expenses and disbursements incurred by my office in connection with the litigation of this matter and that I shall make no claim for such expenses and disbursements or compensation for services herein, in the event that final judgment herein is rendered against Comite National De Gibran.

Yours very truly,
George G. Shiya"

tion and subsequent probate court accounting proceedings, the administrators of the Gibran estate transmitted to respondent checks totalling $180,351.45, representing the net royalties that had accumulated during that litigation. The checks were payable jointly to respondent and to petitioner. Of that sum, pursuant to authority secured from the probate court, $141,000 was retained by respondent to protect the estate's adminsitrators against supposed possible tax liability.[11] Of the balance, $39,351.45, respondent withdrew all but $10.00 for attorney's fees. (App. 15a, 27a, Reply Br. App. 10a-11a, R. 1362-9).

This withdrawal by respondent was made with Basile's consent, but neither respondent nor Basile informed petitioner of it until three years later, in November, 1963 (*ibid;* App. 55a, R. 1369). In 1964, upon the tolling of the statute of limitations upon any possible tax liability, respondent withdrew an additional $5,000 from the fund in his hands—again with Basile's consent but again without either of them advising petitioner (R. 1458-9). Thus respondent had withdrawn virtually his full fee, under petitioner's view of the contract (25% of royalties accrued at termination of the litigation), without either telling petitioner that he had done so or suggesting that he had any claim to a share in royalties payable after termination of the litigation.

Pursuant to the judgment in the Committee's favor in the copyright litigation, the publisher began paying royalties once again to the Committee. Thus, in July of 1963 the Committee received $197,915.76—the Committee's first income

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[11] The "tax question" was solved by respondent by allowing the statute of limitations to toll, which resulted in the withholding of the funds from the Committee for 4 years. Actually, the Committee had been declared exempt from taxes as early as 1936 in a letter ruling from the Internal Revenue Service (App. 74a), and it was only upon the basis of the Committee's liability that the administrators could have been held liable. Respondent testified that he was ignorant of that ruling (App. 97b).

since 1946, when Mary K. Gibran asserted a right to the renewal copyrights. Respondent did not suggest to petitioner that he had any claim to these royalties. Three additional substantial distributions—$44,684.25, $60,520.51, and $61,289.65—were made to the Committee by the publisher in 1964 and in 1965 also without objection by respondent (App. p. 78a).

During this period of time—1960 through 1964—the Committee attempted to secure information respecting the $180,351.45 that had been distributed in 1960 by the administrators to respondent for the account of the Committee (*e.g.*, App. pp. 52a-54a, 58a-72a). The exchange of letters between the Committee and its agent, Basile, became rather heated, and finally on January 11, 1965, Basile replied to the Committee's final ultimatum for an accounting with a final ultimatum of his own (App. p. 68a). In this letter, Basile stated that respondent "considers that $85,000.00, in addition to the sum he received before [$44,341.45], should take care of his demands and the demands of his assistants. This means that the amount suggested by him previously is not considered enough. . . ." On his part Basile demanded compensation of $4,000 a year, or $48,000, plus expenses, although in the past he had assured the Committee that he was donating his services because of his devotion to his former countrymen (*e.g.*, App. p. 151b, Reply Br. App. 1a). Basile's and respondent's demands together amounted to almost exactly the accrued royalties in respondent's hands. Basile said that if the Committee did not agree to these demands, respondent would sue and would ask for 35%—the figure specified in the 1953 agreement—of the royalties that had already accrued as well as "a share of the returns during the coming 28 years specified in the copyrights that were won." And Basile threatened to join the suit and to ask for $6,000 a year instead of $4,000. He stressed the fact that litigation would involve large expenses because of respondent's plans to conduct exhaustive discovery, and concluded with the "final and sincere word" that the "only logical thing that [the Committee] can do is to agree on settling

this problem," because if there is litigation "the expenses it might incur can be much higher than what can be agreed upon as an amount for settlement." Basile testified that he had shown this letter to respondent, who said, "Write it and we will see what they answer," but "they didn't answer" (Reply Br. App. p. 7a).[12]

5. *The contingent fee litigation.* The Committee did not accede. Four months later, on April 29, 1965, respondent brought suit by way of a petition invoking the ancillary jurisdiction of the district court that had decided the copyright litigation (App. p. 18a). The service upon petitioner of respondent's petition was the first and only demand received by petitioner from respondent for a percentage of royalties earned after termination of the copyright suit. Indeed, it was the only writing, other than the contingent fee agreement itself, in which respondent discussed his fees.

While respondent did not even mention the 1956 agreement in his petition, but rather relied upon the 1953 agreement in support of a claim for 35% of all royalties to be received until expiration of the renewal copyrights in 1987 (App. p. 18a), in the course of the litigation he contended that in any event the 1956 agreement at least clearly entitled him to 25% of those royalties. Petitioner, on the other hand, contended that the 1956 agreement clearly restricted respondent to 25% of the royalties accumulated at the time of termination of the copyright litigation, and maintained also that in any event, under New York law, any ambiguities in the contract were to be resolved against respondent

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[12] In response to the question, "Did you not or had you any idea that Dr. Basile was to write this letter to the Committee," respondent testified: "Dr. Basile wrote his letters independently of me, sir. I had no control over what he wrote to the Committee. It was his affair, I dealt with him. But I did not ask him to make any representations on my behalf. He would come to me with various ideas from time to time and put them to me and ask me questions, but I never authorized him to write anything on my behalf. I was fully capable of writing myself." (R. 1505-6, App. 101-2b.)

(Trial Mem. pp. 36-38, R.1413). During the trial, petitioner also attempted to elicit information relevant to the issue of the reasonable value of the services respondent had actually performed (Reply Br. App. pp. 13a-15a, R. 1483-6).

The District Court excluded that type of evidence on the theory that the Court had no power to supervise the amount of the contingent fee once it decided what fee was called for under the terms of the contract (*ibid.*). As to the latter question, the Court concluded that the 1956 agreement was controlling, not the 1953 agreement; but it also concluded that under the 1956 agreement respondent was entitled to a 25% interest in both past and future royalties (App. *infra* p. 20). As to all questions bearing upon the contract dispute, Judge Ryan refused to apply New York law, stating:

> "I do want to point this out to you: The jurisdiction of the Court in this case is an original jurisdiction; it is not predicated on diversity. It dealt with the right to receive a copyright. That is the way the matter came into the court and, it being a Federal matter, I would, of course, even on the fixing of counsel's fee, be guided by Federal law" (R. 1582, App. 116b).[13]

The Court of Appeals, in an opinion by Judge Smith joined in by Judge Kaufman but dissented from by Judge Hays, affirmed. While the Court did not explicitly advert to the appropriate choice of laws, plainly enough it was of the view that the New York law respecting ambiguous or excessive contingent fee contracts was not applicable. First, the Court conceded that the contract was ambiguous, and accordingly looked to "evidence of the circumstances surrounding its making." As to those circumstances—various

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[13]The Court went on to point out that as to a matter not relevant to this petition—the jurisdiction of the Court to award fees relating to legal problems respecting the original, rather than the renewal, copyrights—New York and federal law were in accord that no jurisdiction existed (*ibid.*).

exchanges of correspondence—the Court conceded that the Committee was "able to point to language which appears to limit the fee to a percentage of the funds in court at one or another stage. . . ." Nevertheless, without even mentioning New York law respecting resolution of ambiguities in favor of clients, the Court construed the contract in favor of the attorney. Second, the Court, again without mentioning contrary New York decisions, affirmed the District Court's refusal to consider the question of the reasonableness of the fee.

Judge Hays, on the other hand, dissented on several grounds. First, taking at face value the majority's view that the contract was ambiguous, he said that "the minimum which should be required of a lawyer in relation to his client is that he make clear how much his fee is going to be," and that this was "enough to justify denying Shiya [respondent] the recovery he seeks . . . ." Secondly, Judge Hays said "I believe that the Committee's interpretation of their agreement is in fact the correct interpretation." Thus he believed that the contract clearly provided only for an interest in the royalties accumulated during the litigation, not future royalties. Finally, looking to extrinsic circumstances, Judge Hays observed that, among other considerations, it was revealing that respondent had "fail[ed] to assert any claim to renewal royalties paid to the Committee after termination of the Surrogate Court proceedings." He concluded: "If any ambiguity remains . . . it ought to be construed against Shiya who could easily have avoided any difficulty by providing clearly for a 25% interest in the future royalties."

REASONS FOR GRANTING THE WRIT

This case presents important questions concerning the law to be applied to attorney-client fee litigation in federal courts. There is a conflict among the Courts of Appeals as to the choice between federal and state rules for deciding such litigation. Apart from the choice of law problem, the rules applied by the courts below in determining this litigation are

not consonant with the rules applied in other courts, both federal and state.

A. Choice of Laws in Fee Contract Litigation

As we now show, the question of choice of law is of considerable consequence in view of the volume of attorney-client fee litigation in federal courts and the divergent substantive rules applied in the several states. Moreover, the refusal of the courts below to apply New York law—law that decidedly favors petitioner—gives rise to a conflict among circuits involving a type of problem that often has received the attention of this court.

1. *Incidence of federal court fee litigation.* Disputes between attorneys and clients respecting fees are, regrettably, a frequent subject of litigation in federal courts, and a good deal of that litigation involves contingent fee disputes.[13a] Even where there is not diversity of citizenship between attorney and client, the federal courts entertain attorney-client fee litigation where the dispute arises out of the attorney's representation of the client in a federal court action between the client and another party.[14] The theory is that the federal court, having had jurisdiction of the litigation between

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[13a] See, *e.g.*, the extensive collection of cases cited in 4 Mod. Fed. Prac. Dig., Attorney & Client, §§ 130-192, and in 6 Fed. Dig., Attorney & Client, §§ 130-192.

[14] See, *e.g.*, *United States v. Transocean Airlines, Inc.*, 356 F.2d 2 (5th Cir. 1966); *Pitcher Construction Co. v. United States*, 322 F.2d 843 (9th Cir. 1963); *Application of Kamerman*, 278 F.2d 411 (2d Cir. 1960), *reversing* 166 F. Supp. 324; *Falcone v. Hall*, 235 F.2d 860, 98 U.S. App. D.C. 363 (D.C. Cir. 1956); *United States Fidelity & Guaranty Co. v. Levy*, 77 F.2d 972 (5th Cir. 1935); *Sharor v. Pollia*, 191 F.2d 116 (10th Cir. 1951); *German v. Universal Oil Products Co.*, 77 F.2d 70 (8th Cir. 1935); *Woodbury v. Andrew Jergens Co.*, 69 F.2d 49 (2d Cir. 1934); *Lehigh & N.E. R. Co. v. Finnerty*, 61 F.2d 289 (3rd Cir. 1932); *Byram v. Miner*, 47 F.2d 112 (8th Cir. 1931); *In Re Badger*, 9 F.2d 560 (2d Cir. 1925); *Machinski v. Lehigh Valley R. Co.*, 272 Fed. 920 (2d Cir. 1921); *In Re Hoy's Claim*, 93 F. Supp. 265 (D. Mass. 1950); *Nolan v. Hemingway Bros. Interstate Trucking Co.*, 88 F. Supp. 111 (S.D. N.Y. 1950); *United States v. Hudson*, 39

the client and another party, has ancillary jurisdiction to resolve the dispute between the client and the attorney who represented the client in the original action.[15] That was the basis for federal court jurisdiction in the case at bar (*supra*, p. 16).

2. *Importance of the choice of laws question.* The choice between state and federal law is critically important to the outcome of this type of federal court litigation. In the states, widely divergent rules govern fee litigation. The law of New York with respect to the instant litigation, for example, does not correspond entirely to the law of other states. In New York, the courts inquire into the reasonableness of fees prescribed by contingent fee contracts. In the leading case of *Gair v. Peck*, 6 N.Y.2d 97, 160 N.E.2d 43, 48 (1959), *cert. den.*, 361 U.S. 374, the New York Court of Appeals stated: "Contingent fees may be disallowed between an attorney and his client in spite of a contingent fee retainer agreement if the amount becomes large enough to be out of all proportion to the value of the professional services rendered. . . ." While some other jurisdictions are in accord,[16] others are not.[17] And while the New York rule

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F. Supp. 797 (D. Mont. 1941); *Lawrence v. Commodore Nav. Corporation*, 27 F. Supp. 139 (S.D. N.Y. 1939); *Nic Projector Corp. v. Movie-Jecktor Co.*, 16 F. Supp. 605 (S.D. N.Y. 1935); *Ingold v. Ingold*, 30 F. Supp. 347 (S.D. N.Y. 1939); *Brown v. Morgan*, 163 Fed. 395 (D. Iowa 1908); *Buchner v. Metal Stamping Co.*, 19 F.2d 529 (E.D. N.Y. 1926); *Massachusetts & So. Const. Co. v. Township of Gill's Creek*, 48 Fed. 145 (C.C.D. So. Car. 1891).

[15] See the discussion by Judge Learned Hand in *Woodbury v. Andrew Jergens Co.*, 69 F.2d 49 (2d Cir. 1934), the seminal decision on this subject.

[16] See *Bryant v. Hand*, ___ Colo. ___, 404 P.2d 521, 522-3 (1965); *Husk v. Blancand*, 155 La. 816, 99 So. 610, 612 (1924); *Hamilton v. Grady*, 41 N.E.2d 968, 314 Ill. App. 568 (1942); *Woods v. First Nat. Bank of Chicago*, 314 Ill. App. 340, 41 N.E.2d 235, 237 (1942); *Summerfield v. Clark*, 300 Ill. App. 610, 21 N.E.2d 852 (1939).

[17] See, *e.g.*, the New Jersey decisions cited in *Gray v. Joseph J. Brunetti Construction Co.*, 266 F.2d 809 (3d Cir. 1959); *Bengoechea*

that ambiguous contracts are to be construed against attorneys appears to be generally accepted in other jurisdictions,[18] it is perhaps more rigorously enforced in contingent fee litigation in New York than anywhere else.[19]

Thus, the adoption by the federal courts of a body of federal substantive law governing attorney-client fee litigation would often result in departures from the rules that

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Macias v. De La Torre & Ramirez, 84 F.2d 894, 896 (1st Cir. 1936). In many jurisdictions, the courts will inquire into the amount of a contingent fee only if it is "unconscionable," and "[t]o be unconscionable it must be such as no man in his senses and not under a delusion would make on one hand, and as no honest and fair man would accept, on the other." *Board of Education v. Thurman*, 121 Okla. 108, 247 Pac. 996, 997-8 (1926). See, *e.g.*, decisions cited in 7 C.J.S. p. 1065. *Gair v. Peck* liberalized the standard in New York. See *Appellate Court's Power to Establish Contingent Fee Schedule Upheld*, 60 Colum. L. Rev. 242, 246 (1960).

For another illustration of differing state rules, consider the status of a fee contract entered into after establishment of the attorney-client relationship. In North Carolina, such a contract is void as a matter of law, and the attorney may recover only "reasonable compensation" for his services. *Stern & Swift v. Hyman Bros.*, 182 N.C. 422, 109 S.E. 79, 80 (1921). In Illinois and California fee contracts of this sort are "presumptively fraudulent" and "presumptively invalid," respectively, with the attorney's having the burden of proving that the contract is fair and made in good faith. *Miller v. Solomon*, 49 Ill.App.2d 156, 199 N.E.2d 660, 665 (1964); *Denton v. Smith*, 101 Cal. App. 2d 841, 226 P.2d 723, 725 (1951). On the other hand, Oklahoma places the burden of proving fraud or unfairness upon the client. *Renegar v. Staples*, __ Okla. __, 388 P.2d 867, 872 (1963).

For other examples of differing state rules, see, *e.g.*, 7 C.J.S. pp. 1067-1074.

[18] See the many cases cited in 7 C.J.S., Attorney & Client, §§ 182, 187.

[19] There are a number of reported decisions applying the rule, and it is stated in the most rigorous terms. Thus, in *Mackey v. Passaic Stone Co., Inc.*, 36 N.Y.S.2d 232, 234 (1942), the court said: "It is

would be applicable under state law. Indeed, such a departure occurred in the case at bar, as we have already indicated. The Court of Appeals, while concluding that both the contract and the extrinsic circumstances were ambiguous, refused to resolve doubts against the attorney, thus rejecting petitioner's heavy reliance upon the New York rule to the contrary. And in holding that *quantum meruit* principles would be relevant only "[h]ad the [District] Court held that there was no meeting of the minds on amount" (App. *infra* p. 15), the Court of Appeals turned aside petitioner's contention, based on *Gair v. Peck, supra,* that contingent fee contracts are always subject to the test of reasonableness. It may be noted parenthetically, moreover, that to the extent the Court's further remark that in a *quantum meruit* action "an award of 25% of the value of the recovery . . . would not be extravagant" can be considered an alternative ground for rejection of petitioner's contention, it, too, does not appear consistent with New York law. Nothing in *Gair* suggests that courts are to restrict their inquiry to a simple mathematical comparison between the amount of the fee and the value of the recovery, and are to ignore the factors normally considered by courts as relevant to the test of reasonable-

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well settled that if an ambiguity arise with respect to an agreement between an attorney and his client the agreement is to be construed most strongly in favor of the client. *Matter of Hawke v. Simpson,* 148 App. Div. 326, 328, 133 N.Y.S. 23. As we stated in *Samuels v. Simpson,* 144 App. Div. 466, at page 469, 129 N.Y.S. 534, at page 536: 'An attorney ought to have his agreement with his clients so plain as not to require construction, and, even though the client has independent advice, we think that doubtful clauses are to be construed most strongly against the attorney.'" See also *In re Smith's Will,* 11 Misc. 2d 170 N.Y.S.2d 27 (1958); *Gehr v. Finkelstein,* 129 N.Y.S.2d 284 (1954); *In re Vaupel's Estate,* 37 N.Y.S.2d 853, *aff'd* 266 App. Div. 723, 40 N.Y.S.2d 956 (1942); *Race v. Harris,* 286 N.Y.S. 168, 246 App. Div. 367 (1936); *Newcomb v. Whitehouse,* 162 N.Y.S. 249 (1916).

ness – factors such as the time expended by the attorney and the complexities of the issues with which he dealt.[20]

3. *Conflict respecting choice of laws.* In the main, federal court decisions respecting fee contracts do not clearly reflect whether the courts applied state or federal law.[21] In the Third and Eighth Circuits, however, the rule is plain: state, not federal, law governs. In *Carter v. Spanos*, 250 F.2d 814, 816 (8th Cir. 1958), a diversity action arising out of an attorney's prior representation of a client in a federal antitrust suit, the Court held that the validity of the contingent fee contract was established by state law. And in *Gray v. Joseph J. Brunetti Construction Co.*, 266 F.2d 809 (3d Cir. 1959), a diversity action arising out of an attorney's prior representation of a client in federal agency negotiations, the Court held that the lower court had erred in reducing the fee below the amount called for by the contract because under state law the contract had to be enforced as written.

Gray and *Carter* cannot reasonably be distinguished on the ground that they were diversity actions whereas the case

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[20] As we show later (*infra* p. 32), this narrow test of reasonableness is also in conflict with the law prevailing in the Fourth Circuit. As to other states, in Colorado the rule is that "the court . . . will determine the reasonableness of the amount and will subject it to the test of quantum meruit . . . . [I]t should determine . . . the time spent, the novelty of the questions of law, and the risks of non-return to the client and to the attorney . . . ." *Bryant v. Hand*, __ Colo. __, 404 P.2d 521, 523 (1965). As to *quantum meruit*, see 7 C.J.S. pp. 1120-1128.

[21] See, generally, the cases cited in note 14, *supra*. Of course, federal courts do look to state law on certain types of collateral matters not relating to the merits. Thus, those courts that consider that ancillary jurisdiction exists only where, if the attorney's claim is valid, it entitled him to a lien under state law naturally rely upon state law with respect to the scope of an attorney's lien. See, *e.g.*, *Pitcher Construction Co. v. United States*, 322 F.2d 843 (9th Cir. 1963); *German v. Universal Oil Products Co.*, 77 F.2d 70 (8th Cir. 1935); *Strickland v. Sellers*, 78 F. Supp. 274 (N.D. Tex. 1948).

at bar involved ancillary federal jurisdiction. The consequence of such a distinction would be that, where there is diversity of citizenship between the attorney and his client and where the original action in which the attorney represented the client was tried in federal court, the attorney could elect either federal or state law, depending upon which favored his claim, by invoking either the ancillary or the diversity jurisdiction of the federal court. Such an option would have been open in *Carter*, a diversity case where the initial action was an antitrust suit, and in the case at bar, an ancillary jurisdiction case where there was diversity of citizenship between attorney and client. Accordingly, it is clear that the choice of law in this type of case should be governed by the principle that it is the origin of the right sought to be enforced, not the ground on which the court has jurisdiction, that determines the law according to which the claim in controversy must be adjudged. See *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 410-411; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245; *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176; *Board of County Comm'rs v. United States*, 308 U.S. 343, 349-350; *Wichita Royalty Co. v. City National Bank*, 306 U.S. 103, 107.

The only other basis upon which the existence of a conflict might be thought unclear would be the notion that, since the Court of Appeals did not explicitly state which law it was applying, perhaps it did not agree with the District Court's view that federal law governs. But that is most unlikely. New York law is, as we have indicated, hostile to respondent's position. That is not very startling, since, as this Court is aware, New York has devoted perhaps unparalleled attention to the problems raised by contingent fee contracts.[22] Accordingly, had the Court of Appeals consid-

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[22] In addition to *Gair v. Peck, supra*, see *Anonymous v. Baker*, 360 U.S. 287; *Cohen v. Hurley*, 366 U.S. 117; and *Spevak v. Klein*, 385 U.S. 511. For the leading New York investigations beginning in 1908, see 31 N.Y.S.B.A. Rep. 99; the Wasservogel Report, 14 Mass. L. Q. 1 (1928); The Botein Report, Ass'n of the Bar of the City of N.Y. Year-

ered state law binding, at the very least it would have attempted to distinguish the New York decisions so heavily relied upon by petitioner. But the Court did not so much as cite a single New York decision – or for that matter any decision of any other court as to the point in issue. Thus in this respect the ground for review is stronger than that in *Kermarec v. Compagnie Generale,* 358 U.S. 625, 628, a choice of laws case in which this Court stated:

> "The opinion of that court [the Court of Appeals] does not make clear whether affirmance was based upon agreement with the trial judge that New York law was applicable, or upon a determination that the controlling legal principles would in any event be no different under maritime law. . . . Certiorari was granted to examine both of these issues. . . ."

4. *Considerations respecting the choice of law.* Since *Erie R. Co. v. Tompkins,* 304 U.S. 64, the problem of choice of laws in both diversity and non-diversity federal court litigation has repeatedly engaged the attention of this Court. Under the principles established by this Court, the determination by the lower courts that federal, rather than state, law governed in the case at bar is highly questionable.

As the *Gray* case in the Third Circuit holds and as the most obvious application of the *Erie* doctrine indicates, an attorney-client retainer contract is enforceable by virtue of state law and, hence, the rules by which it is to be construed and applied emanate from state law. Moreover, the states have a particularly strong interest in establishing rules to govern the sensitive and important relationship between attorneys and their clients. To be sure, the Congress could validly regulate attorneys' fees for representation before federal courts or agencies or in connection with federal programs.[23] But there has been no exercise of this power in

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book 293 (1938). See also MacKinnon, Contingent Fees for Legal Services: A Study of Professional Economics and Responsibilities (1964).

[23] See *Brown v. Gerdes,* 321 U.S. 178; *Hines v. Lowrey,* 305 U.S. 85.

connection with copyright litigation.[24] In such circumstances, the teaching of this Court's decisions is that state law is not pre-empted. Since *Erie*, "[t]he instances where [this Court] has created federal common law are few and restricted." *Wheeldin v. Wheeler*, 373 U.S. 647, 651. Just last year the Court, in *Wallis v. Pan American Pet. Corp.*, 384 U.S. 63, 68, said:

> "In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown. It is by no means enough that, as we may assume, Congress could under the Constitution readily enact a complete code of law governing transactions [of the type involved in the litigation]. . . . Whether latent federal power should be exercised to displace state law is primarily a decision for Congress. Even where there is related federal legislation in an area . . , it must be remembered that 'Congress acts . . . against the background of the total *corpus juris* of the states. . . .'"

See also *United Automotive Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696; *De Sylva v. Ballentine*, 351 U.S. 570, 580-581; *Wilburn Boat Co. v. Firemen's Fund Ins. Co.*, 348 U.S. 310; *United States v. Standard Oil Co.*, 332 U.S. 301, 309; *Board of County Comm'rs v. United States*, 308 U.S. 343, 351-352.

The only policy that might support the applicability of federal law is the interest of the federal courts in supervising the relationship between clients and the attorneys who

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[24] Section 40 of the Copyright Act, 17 U.S.C. §116, provides for awarding a reasonable attorney's fee to the prevailing party in copyright litigation. Such an award, of course, runs against the losing party in favor of the prevailing party. The authority to make such an award does not imply authority to declare rules governing the construction of the fee-bargain between each party and his own attorney.

are officers of those courts, particularly in connection with litigation such as copyright controversies as to which federal courts have exclusive jurisdiction. 28 U.S.C. 1338. If there is to be pre-emption of state law on this basis, the ultimate source of authority would be Article III of the Constitution. Something of the sort is suggested in *In Re Hoy's Claim*, 93 F. Supp. 265, 267 (D. Mass. 1950). There Judge Wyzanski expressed doubt whether state attorneys' lien laws should be enforceable in federal court fee litigation where the attorney had represented the client in litigation justiciable only in federal courts.

> "But does it do violence to Article III of the United States Constitution and to the Supremacy Clause of Article VI of the United States Constitution for a state legislature to regulate the substantive relationship between a litigant in the federal courts and his counsel? It might be argued that (1) it is the United States Court acting under Article III . . . and statutes and rules pursuant thereto that admits the attorney to practice before it, (2) his conduct and his rights in connection with litigation in United States Courts are, therefore, the *exclusive* concern of the United States and (3) because of the Supremacy Clause of Article VI . . . no state can govern the relationship of the attorney and of the client in the United States Courts. . . ."[25]

But, conceding the federal courts' interest in overseeing the attorney-client relationship, there is no reason to suppose that this interest will not be adequately safeguarded

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[25]The Court held the lien law applicable because the action was based purely on diversity, "*without in any way intimating any view as to what is the situation where the attorney represents the client in connection with a cause of action which arises out of a federal statute, which is not homologous to a cause of action arising out of state law and which is justiciable only in a United States Court . . . .*" (Emphasis in original.) See also *Cord v. Smith*, 338 F. 2d 516, 524 (9th Cir. 1964).

through the application of state law to fee disputes. Doubtless this particular case, in which the law of New York evidences a more sensitive regard for the rights of clients than the law applied by the lower federal courts, may not be typical. But, if state rules were to fall short of desirable standards, the federal courts could act by way of their disciplinary or rule-making authority or the Congress by way of its legislative authority. In the absence of such federal rules or statutes, it is hard to see why state law should not govern. And it is even harder to see why, particularly in the case of New York law, state law should not at the very least be incorporated into federal law, assuming *arguendo* that Article III suffices to pre-empt state law as the independent source of the substantive law governing this sort of litigation. See, *e.g., United Automotive Workers v. Hoosier Cardinal Corp.* and *De Sylva v. Ballentine, supra.*

In short, entirely apart from the conflict of decisions, the lower court's decision respecting choice of laws is sufficiently dubious when measured against this Court's decisions, and sufficiently important in terms of its impairment of state interests, to warrant review.

B. Conflicts Respecting the Substantive Principles Applied by the Lower Courts

Beyond the question of choice of laws, the decision below raises significant problems respecting the substantive rules governing this type of litigation. If state law controls, then, as we have already indicated, there is an apparent conflict between the rules applied by the Court of Appeals and those applied under New York law. Under Rule 19 of the Rules of this Court, such a conflict alone justifies review. If, on the other hand, federal law governs, then the Court of Appeals applied rules that differ from those applied in other federal jurisdictions, as we now demonstrate.

1. *Strict construction of attorneys' fee contracts.* The principle that, in fee contract disputes, ambiguities in the contract are to be resolved against the attorney who drafted

the document is firmly established, not only in New York, but also in other federal jurisdictions. As the Court of Appeals for the Fifth Circuit put it in *Vans Agnew v. Fort Myers Drainage Dit.*, 69 F.2d 244, 246 (1934): "Even if it properly may be considered that the language used justifies a doubt. . , as [the attorney] chose that language, a doubt as to its meaning is to be resolved against him." See also *Ridge v. Healy*, 251 Fed. 798, 804 (8th Cir. 1918) ("Such a contract, in case of dispute as to the meaning of its terms, will be construed most strongly against the attorney."); *Waugh v. Q. & C. Co.*, 16 F.2d 363, 365 (7th Cir. 1926).[26]

This principle is supported by the considerations underlying the more general rule that documents are to be construed against the drafting party. It is, moreover, also supported by the policy of enforcing the duty of attorneys to secure the interests of their clients. "In a very real sense attorneys are officers of the courts in which they practice; and clients are wards of the court in regard to their relationship with their attorneys. . . . Fee contracts between attorney and client are a subject of special interest and concern to the courts. They are not to be enforced upon the same basis as ordinary commercial contracts. . . ." *Spillker v. Hankin*, 188 F.2d 35, 37-8, 39 (D.C. Cir. 1951). Thus, as Judge Hays put it in this case, "[T]he minimum which should be required of a lawyer in relation to his client is that he make clear how much his fee is going to be." Unless the client is to be required to retain a second attorney to represent him in the fee negotiations, his attorney, in drafting the fee contract, must protect his client by removing every reasonable possibility of misunderstanding. If he does not discharge that responsibility, his expectation should be sacrificed, not his client's.

Beyond these considerations, which apply even where the attorney has been merely negligent, the rule of strict construction also helps prevent deliberate malfeasance. To apply the law of ordinary commercial contracts invites abuse, for

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[26] As to state decisions, see 7 C.J.S., Attorney & Client, §§ 182, 187.

it permits attorneys to seize upon ambiguities in fee contracts in order to demand additional compensation; and particularly in contingent fee situations, such demands cannot easily be resisted, for the attorney typically has control over the sums recovered and can compel his erstwhile client to retain a new attorney to institute a second lawsuit to enforce his rights. See *Faber v. Enkema*, 180 Minn. 493, 321 N.W. 410 (1930); *Hoboken Trust Co. v. Norton*, 90 N.J. Eq. 314, 107 Atl. 67 (1919).[27]

In the case at bar, the Court of Appeals, in refusing to resolve ambiguities against respondent, departed from the rule established in federal court decisions like *Vans Agnew*. Moreover, this case reveals how far the Court of Appeals will carry its views, since it is difficult to see how the contract could even be regarded as ambiguous. As to the central document—the September, 1956 agreement—the Court conceded that it "supports" petitioner (App. *infra* p. 12). That puts it conservatively. The agreement plainly restricts respondent's fee to a share of accumulated royalties at whatever stage the litigation terminated. Thus, if there were an appeal, the agreement provided for a share of "all moneys due The National Committee . . . at the time of the final determination of such appeal." There would have been no point to that provision respecting royalties accrued during an appeal if in any event respondent were to receive a share in *all* renewal royalties.

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[27]In this connection, we speak only of the general importance of the issue. That is, while there can be no question that respondent failed to provide clearly in the contract for the fee he later claimed, this petition is based upon the assumption that this default was not deliberate. The District Court found that respondent "was at no time guilty of any unprofessional conduct, breach of professional ethics, or overreaching but rendered faithful, and most valuable legal services . . ." (App. *infra* p. 19). The question whether this finding was adequately supported would not, of course, be a sufficient basis for seeking certiorari.

Interestingly enough, the Court paid little attention to the September agreement and focused instead on the November, 1956 letter from respondent to petitioner—a letter labeled by respondent as "confirming" and "supplementing" the September agreement and directed to certain objections of petitioner not related to the issues in suit. But in any event the November letter does not support respondent either. It refers to "25% of the monies due and owing from Knopf to the Comite National De Gibran," not to 25% of all moneys due or "to become due." Moreover, as the Court of Appeals itself noted (App. *infra* p. 10), the November letter provided that respondent's fee would be paid upon termination of the litigation. Accordingly, what was obviously intended was a single "payment" of a specific "sum," to use the words of the letter—an intention wholly inconsistent with the notion that respondent was to receive periodic royalty payments over a twenty-year period. It is absurd to suppose that, had respondent intended to receive such future royalties, he would have failed so to specify in his agreement.[28]

Finally, respondent's actions after termination of the litigation in 1960 were revealing. First, he took from the funds

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[28] It would extend this petition unduly were we to discuss in detail the superseded 1953 agreement, which is set forth at note 7, page 8 *supra*. We observe only that it, too, referred to the "claim for the funds deposited in Court by Alfred A. Knopf, Incorporated," as to which respondent was to receive 35% "of all sums recovered." If the language is not clearly in petitioner's favor, at the least it is ambiguous. So the Court of Appeals evidently thought at first, for it referred to "the ambiguity contained in the December 3, 1953 retainer between the phrase 'the funds deposited in Court' (which favors the Committee) and the language 'thirty-five (35%) per cent of all sums recovered by settlement, suit or otherwise' (which favors Shiya) . . . ." App. *infra* p. 13. Then, however, the Court stated that "by using 'claim' to refer to the fund, and 'litigation' to refer to the overall subject matter, the parties clearly manifested their intent that Shiya was retained to recover the fund but would receive 35% of all renewal royalties." That statement simply defies analysis.

in his hands an amount representing almost precisely 25% of the accrued royalties at the close of the litigation. Second, although during the next five years very substantial royalties were paid petitioner, respondent took no steps to enforce a claim to a share in that money. Third, even in the Basile letter of January 11, 1965 (*supra* p. 15), in which Basile stated that "the amount suggested by [respondent] previously is not considered enough," Basile stated only that respondent "considers that $85,000.00 in addition to the sum he received should take care of his demands and the demands of his assistants." As Judge Hays said, petitioner's position is supported by "Shiya's failure to assert any claim to renewal royalties paid to the Committee after termination of the Surrogate Court proceeding" (App. *infra* p. 10).

2. *Judicial authority to regulate the amount of contingent fees.* A second respect in which the lower courts departed from rules prevailing, not only in New York, but also in at least one other federal jurisdiction, relates to the authority of courts to test attorney's fees by the standard of reasonableness, not merely by ordinary rules of contract construction. As to this important question, the Court of Appeals for the Fourth Circuit has opted for broad judicial supervision. In *Maddox v. Fidelity Investment & Title Co.*, 300 F.2d 1, 3 (1962), the Court approved as "completely fair" to the plaintiff attorney a jury charge upon a contract claim under which the jury was instructed that "an attorney's agreements as to fees must be fair and reasonable, in view of the confidential relationship which exists between attorney and client," and that "if they found the agreements were not fair and reasonable, they should award the plaintiff such amount . . . that seemed to them to be fair and reasonable under all the evidence." The *Maddox* rule conforms both with the Canons of Ethics of the American Bar Association and the Canons of Ethics of the New York State Bar Association.[29] Moreover, with respect to the Court

[29]Canon 13 of both Associations provides: "A contract for a contingent fee, when sanctioned by law, should be reasonable under the

of Appeals' suggestion in the cast at bar that in any event the reasonableness of a fee may be judged exclusively by considering the percentage of the recovery that goes to the attorney, it may be noted that in *Maddox* the Court emphasized that there was "testimony in voluminous detail as to the work he had performed . . . ." *Id.*, at p. 4.

On the other hand, the Court of Appeals for the First Circuit agrees with the position taken by the lower courts in the case at bar. In *Bengoechea Macias v. De La Torre & Ramirez*, 84 F.2d 894, 896 (1st Cir. 1936), that Court held in an attorney-client case that the "sole question" was "whether or not there was such an agreement," and that if there was "no question of the reasonableness of the services could arise . . . ." If federal law is to govern in this type of case, this Court should resolve the dispute as to what that law is to be with respect to the obligation of federal courts to supervise contingent fee contracts.[30]

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circumstances of the case, including the risk and uncertainty of compensation, but should always be subject to the supervision of a Court as to its reasonableness."

[30]In *Maddox* and *Bengoechea*, it is unclear whether the courts were applying federal or local law on the point in issue.

CONCLUSION

This case presents significant questions relating both to the sensitive subject of competing federal-state interests, as that tension is reflected in the problem of choice of laws in federal court litigation, and to the important subject of attorney-client relations. Moreover, this case, involving as it does an enormous fee charged against a public charitable trust of a foreign country, provides an appropriate vehicle for this Court to consider these questions. Accordingly, petitioner requests that certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 420, 421—September Term, 1966.

(Argued May 11, 1967 Decided July 10, 1967.)

Docket Nos. 31072, 31073

In the Matter of the Application of

GEORGE G. SHIYA,

Petitioner-Appellee,

—v.—

THE NATIONAL COMMITTEE OF GIBRAN, also known as the COMITE NATIONAL DE GIBRAN, Representing the Town of Becharre, Lebanon,

Respondent-Appellant.

MARY K. GIBRAN and WILLIAM SAXE, as administrators c.t.a. of the Estate of KAHLIL GIBRAN, and MARY K. GIBRAN,

Plaintiffs,

—v.—

ALFRED A. KNOPF, INCORPORATED,

Defendant,

—v.—

THE NATIONAL COMMITTEE OF GIBRAN, also known as the COMITE NATIONAL DE GIBRAN, Representing the Town of Becharre, Lebanon,

Interpleaded Defendant.

Before:

SMITH, KAUFMAN and HAYS,

Circuit Judges.

Appeal from judgment of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Chief Judge,* awarding legal fees to counsel under retainer in copyright action. Affirmed.

JOSEPH M. CUNNINGHAM, New York, N. Y. (Philip G. Reilly, New York, N. Y., on the brief), *for appellee.*

JAMES F. SAMS of Reeves, Harrison, Sams & Revercomb, Washington, D. C. (James M. Ellis and Donovan, Leisure, Newton & Irvine, New York, N. Y., on the brief), *for appellant.*

SMITH, *Circuit Judge*:

The National Committee of Gibran appeals from a judgment of the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Chief Judge,* which upheld attorney George G. Shiya's construction and interpretation of a contingent fee retainer entered into by the parties on November 1, 1956. The question to be resolved is whether Shiya is entitled to 25% of all the royalties from the renewal copyrights on seven works of the author Kahlil Gibran or to 25% of those royalties which had accrued at the termination of his services. We affirm Judge Ryan's decision that Shiya's retainer entitles him to 25% of all the renewal royalties.

Kahlil Gibran died in the United States in 1931. Under his will the royalties on the works in question were bequeathed to the town of his birth, Becharre, Lebanon. The appellant Committee, whose members are elected by the residents of Becharre, was formed to receive and distribute the royalties. When the original copyrights began to expire in 1946, Mary K. Gibran, the author's sister, filed renewal applications both personally and as administratrix of the Gibran estate. The Committee subsequently retained Shiya, who, after considerable litigation, secured the renewal rights for the Committee. See, *Gibran* v. *Alfred A. Knopf*, 153 F. Supp. 854 (S. D. N. Y. 1957), aff'd 255 F. 2d 151 (2d Cir.), cert. denied 358 U. S. 828 (1958). Subsequent proceedings in the Surrogate Court were concluded in 1960.

The negotiations which preceded the November 1, 1956 retainer occurred over more than four years and are evidenced by many documents and some oral testimony, none of which is challenged. In January 1953, in order to obtain payment of the renewal royalties, Mary Gibran filed suit in the Southern District against Alfred A. Knopf, Inc., the publisher of the works. Knopf interpleaded the Committee. Thereupon, the Lebanese Consul General in New York informed the Committee that it would need to appoint an attorney. Joseph Rahme, the president of the Committee, directed inquiries concerning the renewal rights to Dr. Naef K. Basile, a Lebanese-American from Becharre who practiced medicine in New York. Basile replied in April 1953 that "whoever will have the final award, will receive the money and all what shall come out as income from the books in the future" and that unless the Committee retained a vigorous attorney, "the money and whatever will follow then will no doubt go to Mariana." In June 1953, Rahme

granted a general power of attorney to Basile with the understanding that Basile would retain a lawyer.

In the following months, Basile consulted ten to twelve law firms, including Shiya's. Shiya proposed a 35% retainer if he paid expenses and a 25% retainer if the Committee paid expenses. While in Lebanon during July and August 1953, Basile discussed the hiring of a lawyer with Rahme who asserted that Shiya's proposal was too high and instructed Basile to interview additional lawyers. Upon his return to the United States, Basile contacted seven or eight more firms. Unable to locate a competent lawyer who would better Shiya's terms, Basile, on December 3, 1953, retained Shiya

> "to prosecute and adjust for me and for the said National Committee of Gibran, our claim for the funds deposited in Court by Alfred A. Knopf, Incorporated, in connection with the litigation now pending in the United States District Court, Southern District of New York, entitled:
>
> > Mary K. Gibran and William Saxe, as administrators c.t.a. of the Estate of Kahlil Gibran, and Mary K. Gibran, Plaintiffs, against Alfred A. Knopf, Incorporated, Defendant, against The National Committee of Gibran, et al., interpleaded Defendants.
>
> and I do hereby give you as my said attorney the exclusive right to take all legal steps to enforce my said claim and I hereby further agree not to settle this claim in any manner without your consent as attorney.
>
> In consideration of the services rendered and to be rendered by you as my attorney, I hereby agree to pay you, and you are authorized to retain out of any moneys that may come into your hands, thirty-five (35%)

per cent of all sums recovered by settlement, suit or otherwise for or on behalf of The National Committee of Gibran in the above described action, proceeding or litigation."

Shiya then commenced to render legal services for the Committee. During September and October 1954, Basile reported to Rahme on the progress of the litigation, commended the services that Shiya was rendering and stated that it was fortunate that Shiya had agreed to an exclusively contingent retainer. On January 15, 1955, in response to a query by Rahme about Shiya's fee, Basile stated:

> "When I was in Lebanon in the summer of 1953, we conferred together with respect to the fee of Mr. Shiya. I stated to you very clearly that the attorney had requested in the second matter that he receive twenty-five percent of all sums involved or connected with the litigation if you agreed to pay all expenses incidental thereto, or thirty-five percent if he pays all expenses. At that time I heard no objections from you whatsoever. Accordingly, on my return to New York I entered into an agreement with Mr. Shiya covering his fee based upon the terms presented to you."

Six months passed and on July 20, 1955, Rahme informed Basile that Lebanese law restricted retainers to 20% and that the members of the Committee would be surcharged for any excess they paid. Consequently, "in view of the fact that you have written to us to the effect that the lawyer has required thirty [sic] percent for his compensation of the monies that shall . . . be adjudged to inure to the benefit of the committee," Rahme requested Basile to persuade Shiya to accept a fee of 20%. Three months later, on October 29, Basile replied:

> "When I was in Lebanon and met with you and the committee, I presented to you in great detail and clarity what the attorney requested for his fee if he were to pay all expenses incident to the litigation or what his fee would be if you were to pay these expenses. Since there was agreement on your part as to his fee if he paid all expenses and you voiced no objection, I entered into a written retainer agreement with him. This prevailed until the receipt of your last letter and the letter of the committee addressed to Consul Shebea. Both contained comment that the fee fixed by attorney George Shiya is very high and not consistent with Lebanese practice."

Nevertheless, Basile continued, Shiya, "with great reluctance finally assented" to Shebea's suggestion of "a fee equal to twenty-five percent of the total recovery." Basile concluded as follows:

> "Because of the fact that the trial of the case will soon be reached, I found it advisable to write to you for an acknowledgment of Consul Shebea's letter. If you approve of what Consul Shebea and I have suggested and offered to Mr. Shiya, I shall renew my retainer agreement with him and the litigation will proceed in its regular course."

On November 21, 1955 the Committee accepted Basile's "suggestion that Mr. Shiya receive 25% as he requested for fees and the committee considers the 5% added to the 20% to be for expenses and dues incurred by the case." Two days later, Rahme authorized Basile "to enter into an agreement with Mr. Shiya fixing his compensation . . . at twenty-five percent of the recovery, with the remaining

seventy-five percent thereof payable to the committee, free and clear of all expenses of the litigation . . . " On the other hand, the Committee's Decision 88, dated November 20, 1955, which was not communicated to either Basile or Shiya, stated:

> The Secretary was instructed to write Dr. Basile on this decision and to affirm that the 25% is the fee only for the amount of money accumulated at the date of the final ruling on the case.

Almost a year had passed when, on September 8, 1956, Basile wrote Rahme that:

> "I was told by the court this week to present a photo copy of the agreement attached here for your signature and authentication by the American Consul. The agreement states exactly what you have accepted in writing. The lawyer will be paid 25% at the termination of the case and the Committee of Gibran will get 75%. The 25% will include all his fees if the case remains in New York.
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> • • • • •
>
> "Note: Twenty-five percent—till a final judgment is rendered from beginning and through appeal. He is responsible for all expenses of the case. Not clear. He is asking twenty-five percent at the beginning and twenty-five percent through appeal. It will be more correct to have a new agreement drafted by a lawyer who knows English."

The agreement attached provided as follows:

> "[Y]ou are entitled to receive as compensation for such services twenty-five per cent (25%) of all moneys

determined by the Court to be due to The National Committee of Gibran, also known as the Comite National de Gibran, and the said Court or any judge thereof is hereby authorized to provide in any appropriate judgment, decree or order in the said action that twenty-five per cent (25%) of all moneys on deposit in the Registry of said Court to the credit of the said action be paid directly to you, George G. Shiya, and that the remaining seventy-five per cent (75%) thereof be paid to The National Committee of Gibran, also known as Comite National de Gibran.

In view of the possibility of an appeal by one or the other of the parties to said action from the determination of the said District Court, it is our further understanding and it is agreed that you shall be entitled to receive as compensation for your services twenty-five per cent (25%) of all moneys due The National Committee of Gibran, also known as the Comite National de Gibran, at the time of the final determination of such appeal or appeals whether said moneys are on deposit in the Registry of the said Court or in the hands of Alfred A. Knopf, Incorporated, and the said Knopf is hereby authorized and directed to make such payment to you and to remit the remaining seventy-five per cent (75%) thereof to The National Committee of Gibran, also known as the Comite National de Gibran."

The Committee retorted on October 11, 1956 that the provisions of the attached agreement

"fully contradict the agreement which has been reached between the Committee and the attorney, Mr. Shiya. It was agreed between them that the committee pay him 25% of the frozen money in New York upon ter-

mination of the case there, or in any other city, till the final stages. The committee does not pay Mr. Shiya's fees or expenses if the case is not won.

Please inform the Committee regarding this subject and provide us with another agreement, according to our request to be signed by the proper authorities."

On November 1, 1956, the following retainer resulted:

"This letter will serve to confirm the agreement between us supplementing the written retainer forwarded to you in September for your signature before the American Consul in Beirut.

It is understood and agreed between us that the payment to me of the sum of 25% of the monies due and owing from Knopf to the Comite National De Gibran, will be made after the termination of the litigation in the U. S. District Court and any other court to which the case may be taken on appeal. Such payment is to be made to me only in the event that the final judgment in this case is rendered in favor of Comite National De Gibran.

It is also understood and agreed that the above compensation of 25% of monies due and owing from Knopf to Comite National De Gibran will include payment for services rendered by me in this matter, in addition to all expenses and disbursements incurred by my office in connection with the litigation of this matter and that I shall make no claim for such expenses and disbursements or compensation for services herein, in the event that final judgment herein is rendered against Comite National De Gibran . . ."

On June 24, 1957 the Committee wrote Basile to the effect that:

"The copy of the retainer agreement sent to the Committee does not agree with the substance of its basic agreement and that is 25% of the moneys withheld or blocked upon the date of the inception of the trial and not the moneys that are due or that shall become due as appears in your retainer agreement."

Both parties agree that the crucial document is the November 1, 1956 retainer. Judge Ryan concluded that this contract was not ambiguous and that it entitled Shiya to receive 25% of all the renewal royalties. Because this conclusion was based solely on the construction of a written document, it is freely reviewable by us on appeal. *United Nations Korean Reconstruction Agency* v. *Glass Prod. Methods, Inc.*, 291 F. 2d 168, 172 (1961). Cf. *Meyers* v. *Selznick Co.*, 373 F. 2d 218, 222 n. 2 (2d Cir. 1966).

We disagree with Judge Ryan's holding that the November 1, 1956 retainer is not ambiguous. The pivotal phrase is *"the payment to me* of the sum of 25% of the monies due and owing from Knopf to the Comite National De Gibran, *will be made after the termination of the litigation* . . ." ([Emphasis supplied.] In providing that 25% of the fund would be paid to Shiya at the termination of the litigation, the language is not ambiguous. The ambiguity lies instead in the fact that the phrase refers only to the time of payment, not to the time at which Shiya's rights are to be measured. While it is apparent that Shiya is entitled to 25% of all royalties accumulated at the termination of the litigation, it is not clear whether he is also owed 25% of future royalties.

Because the retainer is ambiguous, evidence of the circumstances surrounding its making is admissible.[1] See,

1 It has been repeatedly argued that courts should forthrightly abandon the prerequisite of finding ambiguity before admitting evidence of

e.g., *H. K. Porter Co.* v. *Wire Rope Corp.*, 367 F. 2d 653, 660-61 (8th Cir. 1966); *Boro Hall Corp.* v. *General Motors Corp.*, 164 F. 2d 770 (2d Cir. 1947); *Oil Trading Associates* v. *Texas City Ref.*, 201 F. Supp. 846, 849 (S. D. N. Y. 1962); *West Africa Nav., Ltd.* v. *Ore & Ferro Corp.*, 192 F. Supp. 651 (S. D. N. Y. 1960). The Committee does not challenge Basile's authority to retain Shiya; accordingly, the task on appeal is to examine the "surrounding circumstances" and determine the intention of the parties. Taking into account the "surrounding circumstances," however, we agree with Judge Ryan's conclusion as to what the contract covered.

Thus, while we do not agree that the November 1, 1956 retainer was totally lacking in ambiguity, we are convinced that Judge Ryan's interpretation of its essential meaning is correct. The prize sought in the litigation, for the conduct of which Shiya was hired on a fee which was to abide the outcome, was the full fruits of the renewal copyrights. References to the fund in court and Knopf's disposition of it are to but one stage of the renewal period. The Committee had second thoughts about the fairness of the basic agreement when the subject matter of the litigation proved far more valuable than had earlier appeared. And it is able to point to language which appears to limit the fee to a percentage of the funds in court at one or another stage, i.e., the 1955 correspondence contains various references to the sum from which the retainer is to be drawn. The January 15, 1955 letter from Basile to Rahme referred

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"surrounding circumstances." *United States* v. *Lennox Metal Mfg. Co.*, 225 F. 2d 302, 309-15 (2d Cir. 1955) (Frank, *J.*, concurring); 3 Corbin, Contracts §§542, 542A, 543 (1960), §§543A, 543AA, 543C (Pocket Part 1964); 9 Wigmore, Evidence §2470 (1940); McCormick, Evidence §219 (1954). Because we have here a case of clearcut ambiguity, there is no occasion to pass on those arguments.

to "all sums involved or connected with the litigation"; the July 20, 1955 letter from Rahme to Basile stated that Shiya had "required thirty percent for his compensation of the monies that shall be adjudged to inure to the benefit of the Committee"; the October 29, 1955 letter from Basile to Rahme reported that Shiya had assented to "a fee equal to twenty-five percent of the total recovery"; on November 23, 1955 Rahme authorized Basile to retain Shiya "at twenty-five percent of the recovery." All of these references are ambiguous; they can be read to refer either to the frozen royalties or to all the royalties. Although the parties were aware that all royalties were involved, it is argued that they limited Shiya's retainer to the frozen royalties; and therefore that the 1955 correspondence must be deemed to refer to the frozen fund. The use of the terms "all" and "total" may have been used to distinguish the moneys frozen at the termination of Shiya's services from the moneys frozen at the inception of his services (which, incidentally, is what Rahme's July 24, 1957 letter claimed the retainer to cover).

The September-October 1956 exchange, which led to the November 1, 1956 retainer, is also some support for the argument that the parties intended to limit Shiya's fee to a percentage of the funds frozen. Basile's September 8 letter states that Shiya "will be paid 25% at the termination of the case" which "will include *all* his fees if the case remains in New York." [Emphasis supplied.] "Twenty-five percent . . . till a final judgment is rendered from beginning and through appeal. He is asking twenty-five percent at the beginning and twenty-five percent *through* appeal." [Emphasis supplied.] This claim of Basile's understanding of the agreement is supported by the language of the attached retainer drafted by Shiya. The first paragraph provided that Shiya was entitled to twenty-five

percent "of all moneys determined by the Court to be due" and that the court was authorized to pay twenty-five percent "of all monies on deposit" to Shiya. The second paragraph entitled Shiya to twenty-five percent "of all monies *due*" the Committee *"at the time of the final determination"* of an appeal. [Emphasis supplied.] The Committee's reply supports this reading by stating that it was agreed "that the committee pay him 25% of the *frozen money* in New York upon termination of the case there, or in any other city, till the final stages." [Emphasis supplied.]

However, these arguments seem to us outweighed by the factors favoring the interpretation arrived at by Judge Ryan of the parties' meaning and intent at the time of the November 1, 1956 retainer.

It must be stressed initially that from the outset both Basile and Shiya were fully aware that the subject of the litigation was all the renewal royalties, not simply those "frozen" at the termination of Shiya's services. Keeping Basile's and Shiya's awareness about the subject of the suit in mind, the ambiguity contained in the December 3, 1953 retainer between the phrase "the funds deposited in Court" (which favors the Committee), and the language "thirty-five (35%) per cent of all sums recovered by settlement, suit or otherwise" (which favors Shiya), may well be resolved in favor of Shiya. Furthermore, by using "claim" to refer to the fund, and "litigation" to refer to the overall subject matter, the parties clearly manifested their intent that Shiya was retained to recover the fund but would receive 35% of all renewal royalties. Accordingly, the original retainer seems to have provided that Shiya would receive 35% of all the royalties.

Once the terms of the original agreement are established, the ambiguities in the 1955 correspondence resolve them-

selves in favor of Shiya. As set out above, the January 15, 1955 letter from Basile to Rahme referred to "all sums involved or connected with the litigation"; the July 20, 1955 letter from Rahme to Basile stated that Shiya had "requested thirty percent for his compensation of the monies that shall be adjudged to inure to the benefit of the committee"; the October 29, 1955 letter from Basile to Rahme reported that Shiya had assented to "a fee equal to twenty-five percent of the total recovery"; on November 23, 1955 Rahme authorized Basile to retain Shiya "at twenty-five percent of the recovery." Thus, the parties repeated the understanding that Shiya would receive 25% of all renewal royalties.

The September-October 1956 exchange, which preceded the November 1, 1956 retainer, is further indication of the parties' intent. The first paragraph of the retainer drafted by Shiya which was contained in Basile's letter of September 8 provided that Shiya was entitled to twenty-five percent "of all moneys determined by the Court to be due" and that the Court was authorized to pay twenty-five percent "of all moneys on deposit" to Shiya. Any ambiguity in this paragraph and in the following one which entitled Shiya to twenty-five percent "of all moneys due" the Committee "at the time of final determination" of any appeal can well be resolved in favor of Shiya. The Committee's reply of October 11, 1956, while referring to the "frozen money," is concerned more with the provisions that the retainer is contingent and that Shiya will pay expenses. The final retainer of November 1, 1956 only describes the time of payment and clarifies the concern about contingency and expenses. Judge Ryan had the advantage of observation of the actual negotiators of the agreement, Basile and Shiya on the stand, and credited their testimony. In this

he was justified. Furthermore, the form of retainer urged by the Committee would be unusual; it might encourage attorneys to employ dilatory techniques to prolong the proceedings and thereby augment their fees.

While the fee of Shiya is likely to be large in amount, it is so only because the subject of the litigation, title to which he succeeded in confirming for the Committee, turned out to be of substantial value. Had the Court held that there was no meeting of the minds on amount, an award of 25% of the value of the recovery in *quantum meruit* would not be extravagant.

Judgment affirmed.

HAYS, *Circuit Judge* (dissenting):

It seems to me that the minimum which should be required of a lawyer in relation to his client is that he make clear how much his fee is going to be. The majority concedes that Shiya left the terms of his retainer ambiguous. While I would consider this to be enough to justify denying Shiya the recovery he seeks, I believe that the Committee's interpretation of their agreement is in fact the correct interpretation.

The principal question is the meaning of the phrase "25% of the monies due and owing from Knopf to the Comite" in Shiya's letter of November 1, 1956. The letter prepared by Shiya for Rahme's signature indicates that Shiva's 25% interest was intended to apply only to royalties accrued to the date of termination of the action, including any appeal. Basile's postscript to his September 8th letter ("He is asking twenty-five percent at the beginning and twenty-five percent through appeal") and Rahme's letter of October 11th ("It was agreed between them that the committee

pay him 25% of the frozen money in New York upon termination of the case . . . . "), support this view as does Shiya's failure to assert any claim to renewal royalties paid to the Committee after termination of the Surrogate Court proceedings.

If any ambiguity remains as to the meaning of the phrase "due and owing" in the November 1st letter, it ought to be construed against Shiya who could easily have avoided any difficulty by providing clearly for a 25% interest in the future royalties.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of July, one thousand nine hundred and sixty-seven.

Present: The Hons. J. Joseph Smith, Irving R. Kaufman, and Paul R. Hays.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO
Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Findings of Fact and Conclusions of Law

This proceeding (65 Civ. 1303) having been tried by the Court without a jury and the Court having heard the evidence and considered the stipulations of the parties, finds the facts and states the conclusions of law as follows:

Findings of Fact

1. Kahlil Gibran was born in the Town of Bechari, in the Republic of Lebanon and emigrated to the United States of America.

2. Kahlil Gibran was the author and owned at his death the copyrights of the following books, having the following expiration dates for the original term of the copyrights:

Names	Dates
The Madman, His Parables and Poems	September 28, 1946
Twenty Drawings	September 27, 1947
The Forerunner, His Parables and Poems	September 15, 1948
The Prophet	September 28, 1951
Sand and Foam	October 5, 1954
Jesus Son of Man	October 12, 1956
The Earth Gods	March 14, 1959

3. He died a citizen of the United States of America, a resident of the County of New York, on the 12th day of April, 1931, leaving a personally drafted Last Will and Testament which failed to nominate an Executor.

4. Under the terms of Kahlil Gibran's Last Will and Testament, the royalties on the testator's copyrights were bequeathed to his home-town of Bechari in the Republic of Lebanon.

5. Upon the expiration of the aforementioned copyrights, between September 28th, 1946 and September 28th, 1951, renewal applications were filed by Mary K. Gibran, individually, and Mary K. Gibran and William Saxe, as administrators, c.t.a. of the Gibran estate.

6. Petitioner is an attorney at law, admitted to practice in the State of New York, this Court, the Court of Appeals for the Second Circuit and the Supreme Court of the United States.

7. By Power of Attorney dated June 3, 1953, Naef K. Basile, M.D. was appointed by Respondent as Attorney in Fact to represent the Respondent's interest in the United States.

8. According to the powers granted him in said Power of Attorney, Naef K. Basile, M.D. retained Petitioner George G. Shiya, by a contract in writing dated December 3, 1953.

9. Said contract called for the Petitioner to represent the Respondent in prosecuting its claim to the renewal copyrights of the aforementioned works of the author, Kahlil Gibran, in return for which he was to receive thirty-five percent of all monies due and owing to the Respondent from Alfred A. Knopf, Incorporated, arising from the use of the renewal copyrights on condition that the Petitioner succeeded in recovering for Respondent a right to the renewal copyrights.

10. According to the terms of the said contract of December 3, 1953, Petitioner performed valuable legal services extending over twelve years which finally resulted in a judgment assigning said renewal copyrights to the Respondent.

11. On November 1, 1956 the Petitioner voluntarily modified the contract of retainer dated December 3, 1953, in that he entered into a new written contract with Respond-

ent by which the percentage of his compensation was reduced from thirty-five per cent (35%) to twenty-five percent (25%) of the monies due and owing to the Respondent from Alfred A. Knopf, Incorporated, arising from the said renewal copyrights.

12. The contract of November 1, 1956 was executed and entered into by both the Petitioner and the Respondent by their free and voluntary acts.

13. The sum of $44,346.45 was paid and advanced to the Petitioner by Naef K. Basile, M.D., Attorney in Fact for the Respondent on account for his legal services in obtaining for Respondent the right to the ownership of said renewal copyrights.

14. This sum was advanced by Naef K. Basile, M.D. in accordance with his authority as Attorney in Fact for the Respondent.

15. Petitioner was at no time guilty of any unprofessional conduct, breach of professional ethics, or overreaching but rendered faithful, and most valuable legal services to the Respondent.

16. Up to the present, the Respondent has not performed its part of the contract of November 1, 1956, in that it has not, except for the sum of $44,346.45, compensated the Petitioner for his services in obtaining the rights to the renewal copyrights in accordance with the terms of the contract.

Conclusions of Law

1. The contract of retainer dated November 1, 1956 was valid, and binding upon the Petitioner and Respondent.

2. The contract of retainer of November 1, 1956 was not ambiguous in its terms.

3. According to the terms of the retainer, the Petitioner is entitled to twenty-five per cent (25%) of all monies due or to become due to the Respondent because of the earnings on the renewal copyrights for the entire life of the renewal copyrights on each of the said works of Kahlil Gibran from the date of their renewal until the final expiration of these renewal copyrights.

4. In accordance with the terms of the said contract, Petitioner is presently entitled to twenty-five per cent (25%) of the monies that have been earned to date upon said renewal copyrights.

IT IS SO ORDERED

SYLVESTER J. RYAN
U.S.D.J.

Dated: New York, New York
December 6th, 1966

In the Matter of the Application of GEORGE G. SHIVA etc. GIBRAN et al. v. ALFRED A. KNOPF, INC. v. THE NATIONAL COMMITTEE OF GIBRAN

Endorsement
65 Civ. 1303
Civ. 82-18

The within findings and conclusions proposed by Petitioner, with minor corrections made, have been signed. They are substantially a restatement of the findings and conclusions stated by me on the record at the end of the trial. While unnecessary, they appear desirable in that a formal statement may be of help to an appellate court.

SYLVESTER J. RYAN
U.S.D.J.

Dated: December 6, 1966.

		Charges To Account	The Madman	The Forerunner	The Prophet	Sand And Foam	Jesus Son of Man	Earth Gods	Total	
			$	$	$	$	$	$		
Renewal	9/28/46—10/31/52		2,261.85							
"	9/15/48— "			890.76						
"	9/28/51— "				18,365.97					
Roy. Period	11/1/52—4/30/55		648.00	462.60	43,816.12					
"	5/1/55—10/31/55		171.68	120.94	9,984.60					
"	11/1/55—10/31/56		311.40	214.27	21,718.12					
Renewal	10/5/54— "					1,745.43				
"	10/12/56— "						46.14			
Roy. Period	11/1/56—4/30/57		171.95	114.30	11,271.01	463.12	751.03			
"	6 mo. ended—10/31/57		221.60	175.80	14,387.39	553.29	712.42			
"	" —4/30/58		177.04	91.35	12,532.33	492.99	768.90			
"	" —10/31/58		252.00	218.40	16.027.31	580.80	771.75			
Renewal	3/31/59—4/30/59							11.90		
Roy. Period	6 mo. ended—4/30/59		229.52	119.71	15,119.56	618.12	790.89			
"	" —10/31/59		267.38	188.48	19,727.28	677.33	721.82	137.76		
"	11/1/59—3/31/60		215.64	139.73	13,437.93	573.05	708.15	79.13		
Roy. Period	4/1/60—4/30/60		37.28	24.68	2,976.37	83.21	133.50	16.45	$215,247.04	(A)
"	6 mo. ended—10/31/60		274.09	174.40	22,032.62	817.90	874.79	113.82		
"	" —4/30/61		433.13	314.17	23,456.35	879.80	1,089.67	227.09		
"	" —10/31/61		380.63	277.21	25,650.80	1,064.96	995.93	174.30		
"	" —4/30/62		576.25	301.88	32,237.45	1,327.64	1,359.86	202.65		
"	" —10/31/62		477.59	343.33	36,195.62	1,288.73	1,357.99	226.21		
"	" —3/31/63		486.15	357.00	35,626.34	1,555.82	1,230.04	262.06		
Roy. Period	" —9/30/63		654.39	290.86	40,811.56	1,077.91	1,527.79	321.74	$197,915.76	(B)
"	" —3/31/64		896.50	861.16	53,259.53	2,966.57	2,055.37	481.38	44,684.25	(B)
"	" —9/30/64		785.09	623.86	55,730.61	1,913.82	1,818.54	417.73	60,520.51	(B)
Roy. Period	" —3/31/65		1,210.28	924.77	64,403.39	3,537.31	2,654.89	637.26	61,289.65	(B)
"	" —9/30/65	($4.78)	1,348.46	1,084.64	72,845.05	3,797.26	2,643.10	713.16	$ 73,367.90	(C)
"	" —3/31/66		2,024.13	1,544.41	84,361.26	5,033.43	2,422.68	951.32	82,426.89	(C)
									96,337.23	(C)
		($4.78)	$14,512.03	$9,849.71	$745,974.57	$31,048.49	$25,435.25	$4,973.96	$831,789.23	

(1)
A—paid to US District Court—$113,529.29

(2)
Mary K. Gibran & William Saxe-admin. $101,717.75

B—paid to Comite National Gibran—$364,410.17
C—Not paid—$252,132.02